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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER ANDREW GLASBY, Defendant and Appellant.	D073312 (Super. Ct. No. SCD250811)

APPEAL from an order of the Superior Court of San Diego County, Lisa R. Rodriguez, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Allison V. Acosta and Elizabeth M. Kuchar, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

In November 2013, Christopher Andrew Glasby pled guilty to six counts of grand theft over $950 (Pen. Code, § 487, subd. (a))[1] (counts 2, 5, 8, 10, 13 and 15), and admitted the truth of two prison prior allegations (§ 667.5). One of the prison priors was premised on Glasby's 2013 felony convictions for burglary (§ 459) and petty theft with a prior (§§ 484, 666, subd. (a)) in San Diego, case No. SCD245341 (SCD245341).[2] In February 2014, the trial court imposed a split sentence of six years, four of which were to be served in local custody and the remaining two on mandatory supervision. Glasby's six-year sentence consisted of the low term of one year four months on count 2, one-third the middle term of eight months on counts 5, 8, 10 and 13, plus an additional one-year term for each prison prior.[3] Glasby did not file an appeal from the February 2014 judgment, and his case therefore became final in April 2014.[4]

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

2 "Prior prison term enhancements do not attach to a particular count or case. Instead, they attach to the aggregate sentence irrespective of whether that sentence is pronounced for multiple convictions in the same case or in multiple cases." (*People v. Acosta* (2018) 29 Cal.App.5th 19, 21.)

Although the change of plea form referenced SCD245341, and the burglary conviction in that case, it did not reference the petty theft with a prior (§§ 484, 666, subd. (a)) conviction suffered in SCD245341. The transcript of the plea colloquy is not in the record. However, it appears to be undisputed that the 2013 prison prior was based in part on a conviction for petty theft with a prior (§§ 484, 666, subd. (a)) suffered in SCD245341, as alleged in the information in this case.

3 The court also imposed a concurrent two-year term on count 15.

In August 2017, the trial court granted Glasby's petition to designate his 2013 felony convictions for burglary (§ 459) and petty theft with a prior (§§ 484, 666, subd. (a)) misdemeanors in SCD245341, pursuant to section 1170.18. Section 1170.18 was added through the enactment of Proposition 47 on November 4, 2014 (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 1, p. 70), and became effective the next day (Cal. Const., art. II, § 10, subd. (a)).

In November 2017, Glasby filed a motion pursuant to section 1170.18 to dismiss one of two prison priors (§ 667.5) in this case, premised on the redesignated convictions in SCD245341. In his motion, Glasby argued that the prison prior was no longer valid and should be dismissed because a prison prior "can only enhance a sentence if the convictions underlying it are felonies," and the redesignated convictions in SCD245341 underlying the 2013 prison prior were now misdemeanors "for all purposes" (§ 1170.18). The trial court denied the motion in December 2017.

On appeal, Glasby contends that the trial court erred in denying his motion pursuant to section 1170.18 to dismiss the 2013 prison prior premised on the redesignated convictions in SCD245341. While Glasby's appeal was pending, the Supreme Court issued its opinion in *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*). As discussed in more detail in part III.B, *post*, the *Buycks* court held that "the reduction of a felony conviction to a misdemeanor conviction under Proposition 47 . . . can have retroactive collateral effect on judgments that were not final when the initiative took effect on

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4 A judgment in a criminal case "become[s] final if the defendant does not appeal within 60 days." (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1214.)

November 5, 2014." (*Id.* at p. 883.) The *Buycks* court also explained that where a trial court is resentencing a defendant on Proposition 47 eligible convictions, it may not reimpose felony based enhancements if the underlying felony convictions have been reduced to misdemeanors as of the time of the resentencing. (*Id.* at pp. 894–895.)

It is undisputed that the judgment in this case *was* final at the time Proposition 47 took effect and that Glasby is *not* entitled to be resentenced on any other Proposition 47 eligible convictions. Thus, Glasby is not entitled to have the redesignated convictions in SCD245341 be given retroactive collateral effect in this case, and he is not entitled to resentencing on any other Proposition 47 eligible convictions pursuant to which the prison prior could be dismissed. Accordingly, we affirm the trial court's December 2017 order denying Glasby's motion to dismiss the 2013 prison prior premised on the redesignated convictions in SCD245341.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Glasby's plea*

On November 7, 2013, Glasby pled guilty to six counts of grand theft over $950 (counts 2, 5, 8, 10, 13 and 15). The factual basis for Glasby's plea stated: "On or about 9/1/13, 9/10/13, 9/11/13, 9/15/13, and 9/20/13, I took property from a business. On each occasion, the value of that property was in excess of [$]950.00."

On the same date, Glasby admitted the truth of two prison priors (§ 667.5, subd. (b)). The first prison prior was based on convictions suffered in 2009. The second prison

prior stemmed from convictions suffered in 2013 in SCD245341 for burglary (§ 459) and petty theft with a prior (§§ 484, 666, subd. (a)) (2013 prison prior).

B. *Glasby's sentence*

In February 2014, the trial court imposed a split sentence of six years, as described in part I, *ante*. Glasby's sentence included a one-year enhancement for the 2013 prison prior.

C. *Glasby petition for resentencing in this case*

On November 6, 2014, Glasby filed a Proposition 47 petition for resentencing in this case. The trial court denied the petition because there were no felony convictions eligible for resentencing under section 1170.18. Glasby did not appeal the court's order denying his petition.

D. *Glasby's motion to redesignate the convictions in SCD245341*

Glasby filed a Proposition 47 petition in SCD245341.[5] In August 2017, the trial court granted Glasby's petition and redesignated Glasby's felony convictions for burglary (§ 459) and petty theft with a prior (§§ 484, 666, subd. (a)) as misdemeanors.

E. *Glasby's motion to dismiss the prison prior in this case*

In November 2017, Glasby filed a motion to dismiss the one-year enhancement term imposed in the instant case for the 2013 prison prior. In his motion, Glasby claimed that the felony-based enhancement was no longer valid because its underlying felonies were now misdemeanors for all purposes under section 1170.18, subdivision (k).

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5 The petition is not in the record.

In December 2017, the trial court denied Glasby's motion to dismiss the 2013 prison prior.

F. *Glasby's appeal*

Glasby appeals from the trial court's order denying his motion to dismiss the prison prior.

III.

DISCUSSION

A. *The December 22 order is appealable*

The People claim that Glasby's appeal should be dismissed. They argue that Glasby failed to appeal from the original February 2014 judgment in a timely manner and that the underlying judgment is final. The People also contend that the trial court did not have jurisdiction to rule on Glasby's November 2017 motion to dismiss the 2013 prison prior pursuant to section 1170.18. The People further maintain that since the trial court purportedly lacked jurisdiction to rule on Glasby's November 2017 motion, this court is similarly devoid of jurisdiction to consider Glasby's appeal of the denial of that motion.

We agree with the People that Glasby's February 2014 judgment is final and that Glasby may not appeal from that judgment. Glasby does not contend otherwise. However, we disagree that the trial court lacked jurisdiction to rule on Glasby's November 2017 motion under section 1170.18. (Cf. *Teal v. Superior Court* (2014) 60 Cal.4th 595 (*Teal*).)

In *Teal*, the California Supreme Court concluded that an order denying a defendant's petition for recall of sentence pursuant to section 1170.126[6] is an appealable postjudgment order pursuant to section 1237, subdivision (b).[7] In reaching this conclusion, the *Teal* court rejected an argument similar to that advanced by the People in this case. In *Teal*, the Attorney General argued that "because a trial court has no statutory authority to initiate recall proceedings or consider a defendant's eligibility for relief on its own motion, it lacks jurisdiction to decide issues beyond the threshold eligibility determination when a petitioner fails to meet those eligibility requirements." (*Teal*, *supra*, 60 Cal.4th at p. 599.)

The *Teal* court disagreed with this contention, concluding that, even assuming that the defendant in that case was statutorily ineligible to file the recall petition, the trial court still had jurisdiction to determine this issue in ruling on the merits of his petition. (*Teal*, *supra*, 60 Cal.4th at pp. 597, 600.) The *Teal* court reasoned in part, "The [trial] court's finding of ineligibility here provided a basis to deny the petition. It did not affect petitioner's standing to file the petition in the first instance." (*Id.* at p. 600.) The *Teal* court reasoned further that section 1170.126 "creates a substantial right to be resentenced and provides a remedy by way of a statutory postjudgment motion," and thus, that a denial of a section 1170.126 petition affects the defendant's substantial rights. (*Teal*, *supra*, at pp. 600–601.)

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6 The statute is commonly known as the Three Strikes Reform Act of 2012.

7 Section 1237, subdivision (b), provides that a defendant may appeal from "any order made after judgment, affecting the substantial rights of the party."

Similarly, section 1170.18 creates a substantial right to be resentenced and creates a remedy by way of a postjudgment motion procedure. Glasby sought to vindicate this right through his invocation of this statutory scheme. The trial court had jurisdiction to rule on the merits of the motion, even if it appeared on the face of the petition that he was statutorily ineligible for relief. (Cf. *Teal*, *supra*, 60 Cal.4th at p. 597.) Further, the trial court's denial of Glasby's motion to dismiss the 2013 prison prior pursuant to section 1170.18 affected his substantial rights and created an appealable postjudgment order under section 1237, subdivision (b). (Cf. *Teal*, *supra*, at pp. 600–601.)

Accordingly, we conclude that Glasby may appeal from the trial court's order denying his motion to dismiss the 2013 prison prior.

B. *Glasby is not entitled to dismissal of the 2013 prison prior*

Glasby contends that the trial court erred in denying his motion to dismiss the 2013 prison prior. Glasby argues that because the felony convictions underlying the 2013 prison prior were redesignated as misdemeanors in 2017, the prison prior imposed based on those convictions is no longer valid.[8]

1. *Governing law*

a. *Proposition 47 and section 1170.18*

Among numerous other provisions, Proposition 47 designated as misdemeanors certain theft crimes that were previously classified as felonies. (See, e.g., § 490.2 [petty

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8 Glasby filed his opening brief on July 5, 2018, prior to the California Supreme Court's July 30, 2018 decision in *Buycks*. In their respondent's brief, the People cite *Buycks* and argue that *Buycks* makes clear that Glasby is not entitled to dismissal of his 2013 prison prior. Glasby did not file a reply brief.

theft].) In addition, Proposition 47 created provisions permitting the resentencing of certain defendants (§ 1170.18, subds. (a), (b)) and authorizing the designation of certain prior felony convictions as misdemeanors (*id.*, subds. (f)–(h)). Under section 1170.18's resentencing mechanism, "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing" in accordance with the reduced penalties provided for various crimes contained in the statute. (*Id.*, subd. (a).) A person who satisfies the statutory criteria shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id.*, subd. (b).)

Section 1170.18 also provides that persons who have completed serving felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application to have their felony convictions "designated as misdemeanors." (§ 1170.18, subds. (f)–(h).) Section 1170.18, subdivision (k) provides that convictions that are resentenced or designated pursuant to section 1170.18 "shall be considered a misdemeanor for all purposes," except that such resentencing shall not permit the person to possess firearms. Section 1170.18, subdivision (k) provides:

> "(k) A felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that

> resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."[9]

b. Buycks

In *Buycks*, the California Supreme Court granted review to consider "Proposition 47's effect on felony-based enhancements in resentencing proceedings under section 1170.18." (*Buycks, supra,* 5 Cal.5th at p. 871.) As relevant here, the *Buycks* court concluded that "Proposition 47's mandate that the resentenced or redesignated offense 'be considered a misdemeanor for all purposes' (§ 1170.18, subd. (k)) permits defendants to challenge felony-based section 667.5[10] . . . enhancements when the underlying felonies have been subsequently resentenced or redesignated as misdemeanors." (*Buycks, supra,* at p. 871.) The court further concluded that although "the reduction of a felony conviction to a misdemeanor conviction under Proposition 47 exists as 'a misdemeanor for all purposes' prospectively, . . . under the *Estrada*[11] rule, it can have retroactive

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9 Section 29800 et. seq. define various crimes pertaining to the illegal possession of firearms.

10 Section 667.5 provides for the "[e]nhancement of prison terms for new offenses because of prior prison terms." This is the same enhancement at issue in this case.

11 (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) The *Buycks* court described the *Estrada* rule as being "a limited rule of retroactivity that applies to newly enacted criminal statutes intended to reduce punishment for a class of offenders." (*Buycks, supra,* 5 Cal.5th at p. 881.) The *Buycks* court explained further that, under the *Estrada* rule, "[W]e presume that newly enacted legislation mitigating criminal punishment reflects a determination that the 'former penalty was too severe' and that the ameliorative changes are intended to 'apply to every case to which it constitutionally could apply,' which would include those 'acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final.' " (*Ibid.*)

collateral effect on judgments that were not final when the initiative took effect on November 5, 2014." (*Id.* at p. 883; see *id.* at p. 881 ["The *Estrada* rule rests on the presumption that, in the absence of a savings clause . . . , 'a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not' "].) Thus, with respect to prison priors, the court held that section 1170.18, subdivision (k) "can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under the measure." (*Buycks*, at p. 890.)

The *Buycks* court observed that "nothing in Proposition 47 expressly provides a mechanism for recalling and resentencing a judgment because a prior underlying felony conviction supporting an enhancement in that judgment has been reduced to a misdemeanor." (*Buycks*, *supra*, 5 Cal.5th at p. 892.) Nevertheless, the *Buycks* court explained "that the collateral consequences of Proposition 47's mandate to have the redesignated offense 'be considered a misdemeanor for all purposes' can properly be enforced by means of petition for writ of habeas corpus *for those judgments that were not final when Proposition 47 took effect.*" (*Buycks*, *supra*, at p. 895, italics added.)

The *Buycks* court also explained a method by which a defendant may "challenge [a] prison prior enhancement in [a] judgment if the underlying felony has been reduced to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment." (*Buycks*, *supra*, 5 Cal.5th at p. 895.) Under the "full resentencing rule," (*id.* at p. 894) a trial court that is "*resentencing . . . a Proposition 47 eligible felony conviction*," (*ibid.*,

italics added) must also "reevaluate the applicability of any enhancement within the same judgment *at that time*, so long as that enhancement was predicated on a felony conviction now reduced to a misdemeanor." (*Ibid.*)

2. *Application*

It is undisputed that Glasby's case *was* final when Proposition 47 took effect in November 2014. Thus, it is clear that he is not entitled to dismissal of the 2013 prison prior in light of the August 2017 redesignation of his 2013 convictions under section 1170.18, subdivision (k) and the *Estrada* rule as discussed in *Buycks*. (*Buycks*, *supra*, 5 Cal.5th at p. 895 [limiting relief under section 1170.18, subd. (k) and *Estrada* to "those judgments *that were not final when Proposition 47 took effect*" (italics added)].)

It is also clear that Glasby is not entitled to relief pursuant to the "full resentencing rule," discussed in *Buycks*. (*Buycks*, *supra*, 5 Cal.5th at p. 894.) As noted in part II.C, *ante*, the trial court *denied* Glasby's November 2014 petition for resentencing on his current convictions because none of those convictions were eligible for resentencing under Proposition 47. Glasby did not appeal the court's order denying his petition.[12] (See pt. II.C, *ante*.) Since the trial court will not be conducting a "resentencing . . . [on] a Proposition 47 eligible felony conviction" (*Buycks*, *supra*, at p. 894), the full resentencing rule has no application in this case.

Accordingly, we conclude that the trial court properly denied Glasby's motion to dismiss the 2013 prison prior.

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12 Glasby does not contend in this appeal that he is eligible for resentencing on any of his convictions in this case.

IV.

DISPOSITION

The trial court's order denying Glasby's motion to dismiss the prison prior is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.